

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

DAVID BRIAN MORGAN,)
Petitioner,)
v.) No. CIV-17-80-R
UNITED STATES OF AMERICA,)
Respondent.)

REPORT AND RECOMMENDATION

Petitioner, an Oklahoma state prisoner appearing *pro se*, filed this action with an initial pleading entitled “Post Conviction Motion for Modification Under Liberty Violation.” The jurisdictional basis for the action is not clear. With his initial pleading, Petitioner submitted an Application for Leave to Proceed In Forma Pauperis in which he states that he is commencing this action “for habeas corpus relief.” Application (Doc. # 2). On January 27, 2017, the matter was referred to the undersigned Magistrate Judge for initial proceedings consistent with 28 U.S.C. §636(b)(1)(B).

In an Order to Petitioner to Cure Deficiency entered January 31, 2017 (Doc. # 6), Petitioner was advised that his *forma pauperis* application submitted with his

initial pleading is deficient under 28 U.S.C. § 1915 and that his initial pleading is also deficient as it was not filed on the proper form for either a 28 U.S.C. § 2254 petition or a 42 U.S.C. § 1983 action. The Clerk of the Court was directed to mail to Petitioner by regular mail the appropriate *in forma pauperis* form, and Petitioner was directed to cure the designated deficiencies by February 21, 2017.¹ Petitioner was also advised that if he failed to comply with the Order the undersigned would recommend that the action be dismissed without prejudice and without further notice.

To this date, Petitioner has not complied with the Court's Order. He has not complied with the Court's Order by either paying the filing fee or submitting an adequate *in forma pauperis* application. Nor has he requested an extension of time to comply with the Court's Order. Petitioner has also failed to comply with the Court's Order by filing his action on the proper form. Instead, Plaintiff has submitted a "Post Conviction Motion to File a Rule 60 B (1)(7) and 'Liberty'" which was filed by the Clerk as a "Motion to Set Aside Judgment" (Doc. # 7). This motion does not address Petitioner's failure to either submit an adequate *in forma pauperis* application that complies with 28 U.S.C. § 1915 or his failure to file his action on

¹ The Court's docket in this case reflects that the form was indeed mailed to Petitioner on January 31, 2017, at his last known address.

the proper form for a 28 U.S.C. § 2254 or a 42 U.S.C. § 1983 action.

The undersigned finds that Petitioner's failure to comply with this Court's Order, together with the Court's right and responsibility to manage and control its caseload, warrants dismissal of this action without prejudice. See Nasious v. Two Unknown B.I.C.E. Agents, 492 F.3d 1158, 1161 n. 2, 1162 (10th Cir. 2007)(noting the court applies Fed. R. Civ. P. 41(b) to allow *sua sponte* dismissal for "failure to . . . comply with the rules of civil procedure or court's orders").

RECOMMENDATION

Based on the foregoing findings, it is recommended that Petitioner's cause of action be DISMISSED without prejudice due to his failure to comply with the Court's Order. Petitioner is advised of the right to file an objection to this Report and Recommendation with the Clerk of this Court by March 20th, 2017, in accordance with 28 U.S.C. § 636 and Fed. R. Civ. P. 72. The failure to timely object to this Report and Recommendation would waive appellate review of the recommended ruling. Moore v. United States, 950 F.2d 656 (10th Cir. 1991); cf. Marshall v. Chater, 75 F.3d 1421, 1426 (10th Cir. 1996)(“Issues raised for the first time in objections to the magistrate judge’s recommendation are deemed waived.”).

This Report and Recommendation disposes of all issues referred to the

undersigned Magistrate Judge in the captioned matter.

ENTERED this 27th day of February, 2017.

A handwritten signature in black ink, appearing to read "Gary M. Purcell", is written over a horizontal line.

Gary M. Purcell, United States Magistrate Judge